LIBRARY
SUPREME COURT, U. S.

FILED
FEB 16 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 326

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST
HARRIET BOUSLOG SAWYER, *Petitioner*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL LAWYERS GUILD, AMICUS CURIAE, IN SUPPORT OF PETITIONER

JOSEPH FORER
711 14th Street, N. W.
Washington, D. C.

Attorney for National Lawyers Guild, Amicus Curiae

INDEX

	Page
The Interest of the National Lawyers Guild	1
Argument:	
I. The Suspension Order Interferes With the Administration of Justice by the District Court and Is Therefore Beyond the Power of the Territorial Court	2
II. The Suspension Order Is Unconstitutional Because Its Grounds Do Not Support a Rational Finding that Petitioner Is Unfit to Practice Law and Because It Penalizes Expression Protected by the First Amendment	5
Conclusion	10

CASES CITED

Ex Parte Bradley, 7 Wall. 364	5
Bradley v. Fisher, 13 Wall. 335	4
Bridges v. California, 314 U.S. 252	8, 9
Craig v. Harney, 331 U.S. 367	8
Fujimoto v. United States, 251 F. 2d 342	6, 8
Ex Parte Garland, 4 Wall. 379	5
Re Isserman, 354 U.S. 286	5
Klimes v. United States, — F. 2d — (App. D.C., Jan. 26, 1959, No. 14659)	3
Konigsberg v. State Bar of California, 253 U.S. 252	5
Offutt v. United States, 348 U.S. 11	4
Pennekamp v. Florida, 328 U.S. 331	4, 8, 9
Schware v. Board of Bar Examiners, 353 U.S. 232	5
Ex Parte Tillinghast, 4 Peters 108	5
Yates v. United States, 354 U.S. 298	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 326

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST HARRIET BOUSLOG SAWYER, *Petitioner*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF NATIONAL LAWYERS GUILD, AMICUS CURIAE, IN SUPPORT OF PETITIONER

THE INTEREST OF THE NATIONAL LAWYERS GUILD

The National Lawyers Guild is a national bar association which throughout its history has supported the independence of the bar, the fair administration of justice, and the preservation of civil liberties for all. Many of its members, including the petitioner, have represented unpopular defendants, often at the risk of injury to their personal interests.

In the present case, petitioner has been suspended from the practice of law as an outgrowth of her representation of defendants in the Hawaii Smith Act case. We share the views of the dissent below that the suspension is founded upon "dubious evidence" (R. 599);

that it is unconstitutional (R. 600); that the judgment "serves notice on all lawyers everywhere to hold their tongues" (R. 605); and that petitioner has been disciplined "for conduct in connection with a case in the federal court which federal law holds proper". (R. 618). We are naturally concerned not only with the injustice done to a courageous lawyer, but with the effect and implications of the majority's novel holdings (1) that a territorial court (and by extension a state court) may discipline attorneys for conduct considered to infringe upon the administration of justice by a federal court, though not proceeded against by the latter; and (2) that a lawyer who appears in a case thereby loses the protection of the First Amendment during the pendency of the trial.

The proceeding against petitioner was initiated and carried through by the Hawaii Bar Association. It is appropriate that this Court have the benefit of the contrary views of another organized segment of the bar in a case involving the rights of lawyers.

ARGUMENT

I. The Suspension Order Interferes With the Administration of Justice by the District Court and Is Therefore Beyond the Power of the Territorial Court.

Petitioner has been ordered suspended from practicing law—for all practical purposes fully disbarred—for conduct considered to have been aggressions against the United States District Court for the District of Hawaii. As to petitioner's Honokaa speech, the Supreme Court of the Territory of Hawaii expressly found that this was "a wilful oral attack upon the administration of justice" in the federal court which "impugned the integrity" of the federal judge (R. 118). As to petitioner's interview of juror Fuller,

the theory of the territorial court was that this constituted an invasion of the privacy of the federal court's jury room (R. 120). The federal court itself, though by these findings primarily aggrieved, took no disciplinary action against petitioner.

We submit that the disbarment order was beyond the power of the territorial court because it was an interference by a legislative court with the administration of justice by a constitutional federal court.

1. By asserting the power to discipline attorneys for interrogating federal court jurors after verdict, the territorial court has foreclosed the federal court from receiving, and thus from acting upon, motions for new trials on account of conduct of jurors in the federal jury room. This would be an impermissible interference with the functioning of the federal court even if it adhered unqualifiedly to the familiar dogma that jurors may not impeach their verdict. For it would still be for that court to decide whether or when to relax that principle, to which it should not be forever committed by reason of a control exercised over it by the territorial court. In fact, however, the federal rule is that jurors' statements will be considered on new-trial motions and will under certain circumstances require setting aside a verdict.[1] Moreover, the territorial court's action excludes the federal court from access to information which could be valuable to it in devising methods to insure just verdicts, including the method and scope of the voir dire examination of jury panels and the formulation of jury instructions.

---

[1] See authorities cited by the dissent below (R. 619). Apparently, the latest instance in which a federal court considered the sufficiency of a juror's statement—intimating no reproach of the person who obtained it—is *Klimes* v. *United States*, — F. 2d — (App. D. C., Jan. 26, 1959, No. 14659).

2. By asserting the power to discipline attorneys for commenting on the conduct of a federal court trial, the territorial court is limiting by its own standards, no matter how provincial, what the federal court and the public generally may hear about the operation of federal justice. This also derogates from the dignity of the federal court by making it appear to the public that the federal court is under a protective custody of the territorial court. Of course, the inhibition on criticism considered disrespectful inevitably suppresses other criticism as well.

Furthermore, if the territorial court is to act rationally and fairly in disciplining attorneys for remarks about the federal court—and any other kind of action would violate due process—it must embark into inquiries which inevitably intrude into the operations of the federal court and the conduct of the federal judge. For example, in order to determine whether the attorney was at fault and, if so, the seriousness of his offense, the territorial court obviously should consider whether his criticisms were true, whether they were provoked, whether they actually affected the trial, and whether he should have reasonably expected them to affect the trial.[2]

We suggest that these are the reasons, though inarticulated, which led Chief Justice Marshall to admit an attorney to the bar of this Court while refusing to inquire into the circumstances of his disbarment in

[2] For the relevancy of motive and mitigating circumstances in disbarment proceedings, see *Bradley* v. *Fisher*, 13 Wall. 335, 354. For the relevancy of judicial provocation in contempt proceedings, see *Offutt* v. *United States*, 348 U. S. 11, 12-13. For the relevancy of accuracy of comment in contempt proceedings, see *Pennekamp* v. *Florida*, 328 U. S. 331, 344-345.

another court for allegedly contemptuous conduct. *Ex Parte Tillinghast,* 4 Peters 108. Similarly, this Court long ago held that one court may not disbar an attorney as punishment for a contempt committed against another court. *Ex Parte Bradley,* 7 Wall. 364.

II. The Suspension Order Is Unconstitutional Because Its Grounds Do Not Support a Rational Finding That Petitioner Is Unfit to Practice Law and Because It Penalizes Expression Protected by the First Amendment.

Petitioner has been disbarred for reasons which do not rationally justify a finding that she is unfit to practice her profession and because she uttered constitutionally protected expression. The disbarment therefore violates due process of law and the First Amendment. *Schware* v. *Board of Bar Examiners,* 353 U. S. 232; *Konigsberg* v. *State Bar of California,* 353 U.S. 252; *Ex Parte Garland,* 4 Wall. 379.

1. Petitioner's post-verdict interview of a juror cannot be a valid ground for discipline because it was a legitimate exercise of her professional responsibility toward her clients. It is particularly deplorable, as well an unconstitutionally discriminatory, that an acknowledgedly common practice of the bar (R. 119) for the first time became an offense when it was adopted by an attorney representing unpopular defendants. It is hard to avoid the conclusion that petitioner's disbarment has its real roots in "atmospheric considerations" generated by her representation of the Smith Act defendants. (Cf. Jackson, J., in *Re Isserman,* 354 U. S. 286, 294.)

2. The Honokaa speech is likewise not a valid basis for finding unfitness. Petitioner is an attorney of hitherto unblemished reputation, who has courageously represented the underdogs in a semi-colonial society.

She appeared as counsel for defendants in a Smith Act conspiracy trial at a time of utmost public hostility against such defendants and against attorneys who dared to represent them. She became indignant—to many persons understandably and justifiably so—at the nature of the Smith Act, the prosecution's tactics and theories, the quality of the prosecution witnesses, the lafitude for the introduction of prosecution evidence, and the prejudicial environment. She had ample reason to apprehend a miscarriage of justice. In fact her clients were convicted at the trial even though the evidence was insufficient to prove guilt. *Fujimoto* v. *United States,* 251 F. 2d 342. And the traumatic effect of the extra-judicial pressures on juror Fuller and his account of the jury deliberations vividly establish that the jury did not and could not act dispassionately (R. 6-12). Petitioner spoke to a public meeting in a small town "in the island most distant" from the city of trial (R. 609). Her audience was mostly members of a union of which one of the defendants was an officer. It is understandable that the defendants, enveloped as they were by public animosity, were in dire need of some public support. Petitioner's speech was not an unreasoning diatribe. It gave reasons, explanation and examples, and sought to appeal to the intellect as well as to the audience's sense of fair play. There is neither a finding nor a suggestion that the speech had any influence on the jury. Any such supposition would, indeed, be ludicrous in view of the unremitting propaganda against Smith Act defendants and juror Fuller's description of the jurors' attitudes.

From petitioner's rather lengthy speech the Supreme Court of Hawaii culled five remarks which it consid-

ered gross misconduct (R. 117). Three of these remarks cannot, in context and with any degree of reason, be understood to involve criticism of the trial judge.[3] The other two remarks[4] (which were obviously addressed to all Smith Act trials and not just the *Fujimoto* case) can be taken to involve criticism of the trial judge only by drawing inferences which are not necessarily inherent in the ambiguous text and by disbelieving petitioner's own disclaimer of any intention to refer to Judge Wiig (R. 29). Even if the inference is made, it is still unreasonable to construe the remarks as reflecting on the integrity of the judge. Condemnation of a judge's rulings by no means disparages his character; otherwise the whole bar would be constantly personally embroiled with the whole bench.

By any unjaundiced and sophisticated view, petitioner's comments, even if they be interpreted to be critical of the trial judge's conduct of the proceeding, do not amount to very much. The cry that a trial judge is violating all the rules of evidence, thereby enabling the prosecution to make a case, can be heard in the corridors of almost any courthouse on almost any business day. Judge Chambers, the author of the ma-

---

[3] These were: (1) the statement about "some rather shocking and horrible things that go on at the trial" (R. 574); (2) "there's no such thing as a fair trial in a Smith act case" (R. 577); (3) "unless we stop the Smith trial in its tracks here there will be a new crime, people will be charged with knowing what is included in books." (R. 577). The quotations are from the Matsuoka notes, which both the majority and the dissenters below accepted as the most accurate account available (R. 587, 592).

[4] (1) "all rules of evidence have to be scrapped or the government can't make a case" (R. 577); (2) "they just make up the rules as they go along" (R. 577).

jority opinion below, was just about as harsh, though more polished, when he wrote, "One may as well recognize that the Yates decision [*Yates* v. *United States,* 354 U. S. 298] leaves the Smith Act as to any further prosecution under it, a virtual shambles—unless the American Communist Party should witlessly set out to reconstitute itself with a new 'organization.'" *Fujimoto* v. *United States, supra:* And, of course, petitioner's remarks about the trial judge (if they were about the trial judge) pale into insignificance beside criticisms made of this Court in recent years by numerous lawyers, some of them in high station.

Under the circumstances, petitioner has been disbarred on the basis of an arbitrary construction of her speech and for trivial reasons which have no rational relationship to her fitness to practice law.

3. If petitioner's speech—or one much more vehement—had been uttered by anybody else, including some person or newspaper who might be expected to have a significant influence on the trial judge and jury, it would concededly have been within the area of the First Amendment and thus protected against sanctions. *Bridges* v. *California,* 314 U. S. 252; *Pennekamp* v. *Florida,* 328 U. S. 331; *Craig* v. *Harney,* 331 U. S. 367. It is impossible to understand why the speech is outside of the protected area and a legitimate basis for reprisal because it was uttered by petitioner. The design of the First Amendment is, after all, to guarantee the right of the people to hear. If they have a constitutional right to hear certain words spoken at a given time and place, it cannot be taken away from them because of the identity of the speaker.

The court below held that petitioner's speech was not protected by the First Amendment because petitioner

was counsel in the pending case. This is a statement of a conclusion for which no adequate support is given. The court reasoned that petitioner was a court officer "charged with the duty of keeping the temple clean" (R. 562). But this is an obligation with which all lawyers, as well as others, are charged, yet even the court below agreed that the speech would have been protected if made by a lawyer who was not in the case. Furthermore, petitioner cannot reasonably be found to have violated this duty in the absence of an inquiry into the truth of her remarks. Hiding the fact that a place is soiled is not the same as keeping it clean.

The fact that the litigation was pending is surely not adverse to petitioner. This Court has held that this circumstance only emphasizes the value of the constitutional protection, since the utterance may lose its timeliness and importance if delayed to the end of the case. *Bridges* v. *California, supra,* at 278; *Pennekamp* v. *Florida, supra,* at 346.

The concurring opinion below asserts that a lawyer surrenders his constitutional rights during a trial by entering his appearance (R. 588). No justification for this novel doctrine appears in the Constitution or in precedent. It is not responsive to any social need or essential to the administration of justice. It is fundamentally at odds with the purpose and text of the First Amendment, and is inconsistent with the function of the Amendment to protect the right of the public to be informed, rather than the right of individuals to say what they please. Nothing more clearly reveals the lack of substance in the concurrence's view than the inaptness of its "analogy"—that a lawyer must take his seat when the judge tells him to.

CONCLUSION

The decisions of the territorial court and the court below are "self-inflicted wounds" of our judicial system which jeopardize the independence of the bar and the right of the public to fearless representation. The judgment below should be reversed with a direction to dismiss the proceeding against petitioner.

Respectfully submitted,

JOSEPH FORER
711 14th Street, N. W.
Washington, D. C.

Attorney for National Lawyers Guild, Amicus Curiae